

IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals, Hon. Henry W. Saad, Presiding

SEYBURN, KAHN, GINN, BESS,  
DEITCH AND SERLIN, P.C.,  
Plaintiff-Appellant,

V

KIRIT BAKSHI,  
Defendant - Appellee.

SC: 136 436  
COA: 272 903  
Oakland CC: 99-18126-CK

SEYBURN, KAHN, GINN, BESS  
& SERLIN, P.C.

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**BRIEF ON APPEAL - APPELLEE**  
**APPELLEE ORAL ARGUMENT REQUESTED**

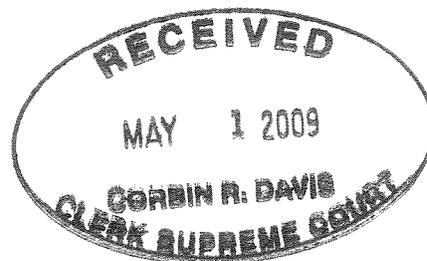


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**STATEMENT OF THE BASIS OF JURISDICTION**

Defendant-Appellee accepts the statement of basis of jurisdiction of Plaintiff-Appellant as complete and correct.

## COUNTER STATEMENT OF QUESTIONS INVOLVED

- I. IS DETERMINATION OF MULTIPLE ISSUES MADE BY THE MICHIGAN SUPREME COURT IN ITS 2003 OPINION IN THE INSTANT CASE BINDING AND CONTROLLING AUTHORITY FOR THE INSTANT CASE?

The trial court answered "No"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- II. IS LAW FIRM'S REPEATED RELIANCE ON ETHICS OPINION R-19 (AUGUST 2000) IN ITS BRIEF NOT RETROACTIVELY APPLICABLE TO THE CIRCUMSTANCES IN OCTOBER 1993 IN THE INSTANT CASE?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- III. WAS LAW FIRM'S ACTION BROUGHT TO RECOVER THE BALANCE DUE UPON A SINGLE MUTUAL AND OPEN ACCOUNT?

The trial court answered "Yes"  
The Court of Appeals answered "No"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- IV. DOES MCL 600.5831 APPLY TO AN ACTION BY AN ATTORNEY AGAINST HIS CLIENT TO RECOVER UNPAID LEGAL FEES ONLY FOR ITEMS PROVED IN THE ACCOUNT?

The trial court answered "No"  
The Court of Appeals answered "Yes"

Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- V. CAN A LEGAL SERVICE PERFORMED AFTER THE TERMINATION OF AN ATTORNEY-CLIENT RELATIONSHIP BE "THE LAST ITEM PROVED IN THE ACCOUNT" UNDER MCL 600.5831 UNDER CERTAIN CIRCUMSTANCES?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- VI. CAN THERE BE A MUTUAL AND OPEN ACCOUNT AFTER TERMINATION OF AN ATTORNEY-CLIENT RELATIONSHIP UNDER CERTAIN CIRCUMSTANCES?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- VII. DOES A CLAIM BY AN ATTORNEY AGAINST HIS CLIENT FOR UNPAID LEGAL FEES ALWAYS ACCRUE ON THE DATE THE ATTORNEY-CLIENT RELATIONSHIP ENDS UNDER MOST CIRCUMSTANCES?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- VIII. WAS THIS ACTION FILED WITHIN SIX YEARS OF DEFENDANT'S FINAL REFUSAL TO PAY FOR SERVICES WHICH WERE PROPERLY BILLABLE OR WITH MUTUAL AGREEMENT BETWEEN PARTIES TO PAY FOR SUCH SERVICES?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "No"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- IX. DOES THE DECISION OF THE COURT OF APPEALS OVERRULE ANY SETTLED PRECEDENT OR RULE OF LAW BUT SIMPLY RESTATES EXISTING MICHIGAN LAW THAT A CLAIM FOR AN ATTORNEY'S LEGAL SERVICES PURSUANT TO AN EXPRESS AGREEMENT ACCRUES AS OF THE DATE OF TERMINATION OF ATTORNEY – CLIENT RELATIONSHIP BY AN ORDER OF WITHDRAWAL OF ATTORNEY AND IN THE ABSENCE OF ANY PRIOR WRITTEN AGREEMENT CREATING AN OBLIGATION ON THE PART OF FORMER CLIENT TO PAY FOR ANY POST TERMINATION SERVICES?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- X. IS, IN THE EVENT THE SUPREME COURT REVERSES THE COURT OF APPEAL AND REINSTATES PLAINTIFF'S CLAIM FOR ATTORNEY FEES, BAKSHI ENTITLED UNDER DUE PROCESS TO HAVE THIS CASE REMANDED TO THE COURT OF APPEALS FOR ADJUDICATING ISSUES RAISED BUT NOT ADJUDICATED BY THE COURT OF APPEALS AND / OR THE TRIAL COURT?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "No"  
Defendant-Appellee answers "Yes"

- XI. IS A CONTRACT FOR LEGAL SERVICES LIKE OTHER SERVICE CONTRACTS?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"

Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- XII. WAS CONTRACT INTEREST IN AMOUNT OF \$ 510,405.07 BAKSHI'S LEGAL OBLIGATION TO PAY UNDER FEE CONTRACT OR OTHERWISE?

The trial court answered "Yes"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- XIII. DID BOTH TRIAL COURT AND THE COURT OF APPEALS DETERMINE THE DATE OF THE LAST PROPER BILLING AS DIRECTED BY THE MICHIGAN SUPREME COURT ON REMAND?

The trial court answered "Did not adjudicate"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

- XIV. CAN LAW FIRM TAKE ADVANTAGE OF ITS UNETHICAL BEHAVIOR OF BILLING BAKSHI FOR RETURNING HIS FILES IN OCTOBER 1993 IN VIOLATION OF THEN APPLICABLE RULES OF ETHICS CI - 845 AND CI - 926?

The trial court answered "Contradicted itself"  
The Court of Appeals answered "Did not adjudicate"  
Plaintiff-Appellant answers "Yes"  
Defendant-Appellee answers "No"

# COUNTER STATEMENT OF FACTS

## ATTORNEY-CLIENT RELATIONSHIP

### (FEE CONTRACT)

This case has a lengthy factual and procedural history. In November 1989, Appellee Bakshi (Bakshi) retained Appellant Law Firm (Law Firm) to represent him and his corporations in various litigation matters ("Interface Litigation") as per the written agreement (**Exhibit: Fee Contract, 1a-2a**)

The said Fee Contract between the parties did not contemplate an open account. Fee Contract required Bakshi to pay in full for Law Firm's services and expenses each month within ten days of receipt of Law Firm's invoice by Bakshi. It further required Bakshi to pay a carrying charge (Contract Interest) at the rate of eighteen per cent per annum for sums not paid within thirty days of the invoice. It also provided that if the Fee Contract is terminated, all sums then due and owing for Law Firm's services and costs advanced, to that time, shall be paid forthwith. It is significant to note that the Fee Contract did not have any provision or did not obligate Bakshi to pay for post termination charges if any.

**Exhibit: Fee Contract, 1a-2a**

### PARTIES ELIMINATED CONTRACT INTEREST PROVISION FROM FEE CONTRACT

Shortly after the Fee Contract was entered into in November 1989, Law Firm and Bakshi verbally modified the Fee Contract by agreeing to remove the

Contract Interest clause in the original Fee Contract. Accordingly, Law Firm never charged, billed or demanded any carrying charges in any manner at any time from Bakshi on amounts not received by Law Firm within thirty (30) days during the entire 4 year attorney-client relationship from 1989 to 1993 or thereafter. This is evidenced by:

1. Each and every invoice and statement from the Law Firm to Bakshi showing unpaid balance over 30 days but without any charges for contract interest over the entire relationship between parties.

**Exhibit:** Summary of Law Firm's all invoices, **9a-13a.**

2. The said summary of Law Firm's bills from 1989 to 1993 does not show any Contract Interest charges whatsoever at any time on the amounts not received by Bakshi's Attorneys within thirty (30) days starting with the invoice dated February 16, 1990 and thereafter.

**Exhibit:** Summary of Law Firm's all invoices, **9a-13a.**

3. The fact that statement of account sent by Law Firm to Bakshi on June 16, 1994, more than 7 months after the attorney-client relationship was terminated on September 30, 1993 also does not show any charges for the Contract Interest.

- **Exhibit:** Law Firm's Statement of June 16, 1994, at **13b to 14b--b.**

4. Law Firm's Complaint in the instant case filed on October 8, 1999 does not claim any damages for Contract Interest.

- **Exhibit:** --- Law Firm's Complaint at **5a.**

5. Further on December 5, 2008, Law Firm's attorney Acker during deposition of Law Firm's attorney Barry Powers in a related case stipulated that exhibit containing all the invoices of Law Firm to Bakshi recorded no interest or carrying charges from month to month.

"MR. ACKER: The only thing that we stipulated to this morning is the fact that on the invoices contained in Exhibit Number Three, there is no recorded interest or carrying charge of interest from month to month."

**Exhibit ---** Deposition of Barry Powers at 41, Lines 12 to 16.  
(OCCC Case # 2008-091137-CZ)

Therefore Law Firm's any and all alleged claims for the Contract Interest are without merit and bogus.

**NO AGREEMENT FOR FEES OR COSTS  
AFTER TERMINATION OR WITHDRAWAL**

The Fee Contract contained language that each party could terminate the agreement upon reasonable notice to the other. It also contained language that the Law Firm could withdraw from the agreement under certain circumstances. There were no provisions made in the Fee Agreement for the payment of any fees or costs incurred after the termination or withdrawal of representation. The Fee Contract also made no provision for the extension of rights or duties beyond termination of the said Fee Contract other than those obligations arising by application of the Michigan Rules of Professional Responsibility then applicable in 1993.

## Billing Disputes

As provided in the Fee Contract and as modified by parties, Law Firm was billing Bakshi from time to time by sending a statement around the 20<sup>th</sup> of the month for legal services rendered and disbursements incurred during the prior month but without any Contract Interest charges.

The disputes about Law Firm's billing for its services to Bakshi arose shortly after the parties started client-attorney relationship in 1989. Bakshi objected and disputed Law Firm's many charges to Bakshi. Thereafter from time to time Bakshi continued to dispute Law Firm's additional charges.

After reviewing some of the disputed charges, Law Firm reduced its billings to Bakshi by about \$20,782.44 by September 1991. The reduction of the billings was a part resolution of billing disputes. It is significant to note that the said reduction of billing represents at least 100 to 150 hours of attorney time as per Fee Contract.

The disputes about Law Firm's billings to Bakshi continued. Finally Bakshi ceased paying Law Firm's bills in November 1992, while the appeal in the Interface Litigation was pending, and thus breached the Fee Contract including its mutuality. At this time, Bakshi had already paid about \$92,000, and his remaining balance was \$50,603. Bakshi did not make any further payments thereafter.

The parties continued to dispute this matter over the next several months. On March 3, 1993, Law Firm argued a motion in trial court on Bakshi's behalf. As per Law Firm's own affidavit (and as later held by the Court of Appeals in its

April 1, 2008 opinion), this was the last date on which Law Firm performed a service for Bakshi that was not related to the dissolution of the attorney-client relationship. On April 27, 1993, Law Firm drafted a motion to withdraw as Bakshi's counsel, and charged him for this task. Again as per Law Firm's own affidavit (and as held by the Court of Appeals in April 2008 opinion), Law Firm discontinued providing legal services to Bakshi as of April 27, 1993

**EXHIBIT: Gold Affidavit at 2b, Paragraph 6)**

**EXHIBIT: COA opinion of April 1, 2008 at 103a, Last Paragraph**

**LAW FIRM'S FINAL BILL UNDER ATTORNEY FEE AGREEMENT**

**SENT ON MAY 7, 1993**

As admitted by Law Firm in its 1995 affidavit, Law Firm discontinued providing legal services to Bakshi on April 27, 1993 (**Exhibit: Gold Affidavit at --- b, Paragraph 6**). Instead of following Law Firm's customary practice of billing Bakshi around the 20th of the month as provided in the Fee Contract (**EXHIBIT: at 1a, Paragraph 3**), Law Firm sent it's next bill to Bakshi on May 7, 1993 immediately after discontinuing it's services to Bakshi on April 27, 1993.

**EXHIBIT ----: Bill of May 7, 1993  
1995 Gold Affidavit at 5b**

This bill dated May 7, 1993 was the final bill under the Fee Contract. In its pleadings in the 1995 malpractice case Law Firm has **repeatedly admitted** that its activities post June 30, 1993 are not providing legal services as to the matters which gave rise to Bakshi's malpractice claims (In other words Law Firm was stating that its billings post June 30, 1993 are not proper bills under the Fee Contract). Law Firm stated in its said pleadings that the only activities which the

Law Firm performed in the two years before the malpractice lawsuit was filed on June 30, 1995 was to call the Court of Appeals on August 31, 1993 to check on the status of its own motion to withdraw and to assemble Bakshi's case file for eventual return to Bakshi in October 1993. Bakshi has maintained that these activities do not constitute properly billable services under the Fee Contract and thus should not be considered in any way as a basis for extending accrual date of Law Firm's complaint whether or not Law Firm's claim is based on breach of contract for legal services theory or under a claim on open account for unpaid legal services theory for the simple reason that both theories require billable items to be properly billable. i. e. billed items have to be proven in the account.

**Exhibit:** Law Firm's pleadings in malpractice case COA Docket # 203885 at 24 b, Last paragraph

**Exhibit:** Law Firm's pleadings in malpractice case COA Docket # 220867 at 28 b, Last paragraph

#### **INTRODUCTION OF FOOTNOTE IN LAW FIRM'S BILLS DEMANDING PAYMENT IN 10 DAYS**

Law Firm altered billing practice after terminating its legal services to Bakshi on April 27, 1993. For the first time the Law Firm began adding a footnote starting with the said May 7, 1993 bill demanding payment in ten days (by May 17th 1993)

**EXHIBIT:** Bill of May 7, 1993, 1995 Gold Affidavit Foot Note, at 5 b

Law Firm added a similar foot note demanding payment in ten days in all the invoices it subsequently issued after May 7, 1993.

**EXHIBIT:** 1995 Gold Affidavit Foot Note, at 5 b to 8 b

Law Firm never used to add any such foot note demanding payment in ten days at any time in any of its invoices to Bakshi from 1989 through April 1993. Only after Law Firm discontinued its legal services to Bakshi on April 27, 1993, Law Firm started adding footnote demanding payment in ten days starting with the invoice dated May 7, 1993. It is significant to note that Law Firm is now using this altered billing practice as the spurious basis for its present contention before this Court that all Law Firm has to do to extend the period of already terminated attorney-client relationship and accrual date for its claim is to artificially identify an invoice as its final account regardless of actual relationship or lack of relationship between Law firm and its former client. Further Law Firm wants this Court to ignore the fact that the alleged final bill of November 12, 1993 does not say it is final bill or does not show final amount of \$62,763.49 alleged in the complaint.

Bakshi did not pay any amounts against these post April 27, 1993 invoices. (Bakshi had already discontinued paying Law Firm in November 1992)

**EXHIBIT:** Bill of 11/ 12/ 1993, 1995 Gold Affidavit  
**Foot Note, at 8 b**

### **Dissolution of Attorney-Client Relationship**

On June 8, 1993, Bakshi notified Law Firm that he believed “our attorney client relationship must be terminated or substantially modified.” He gave Law Firm two “options,” as follows:

1. Seyburn could refund the fees already paid and enable Bakshi to retain substitute counsel with the refunded money, or

2. Seyburn could refund 75% of the fees paid, file an appeal, and withdraw. Bakshi also stated that he had no financial resources to pay for the litigation.

Law Firm rejected both the said options and on July 30, 1993, it moved in the Court of Appeals to withdraw as Bakshi's counsel. It stated that Bakshi was "indebted to counsel for fees and costs incurred at the trial court level as well as fees associated with the appeal," and that Bakshi "has indicated that he is not willing to pay the outstanding fees or costs." Law Firm also stated in the withdrawal motion that the attorney-client relationship between itself and Bakshi was "subject to irreconcilable differences and has broken down to such an extent that counsel can not effectively represent [Bakshi's] interest in this appeal." The Court of Appeals by granting the motion to withdraw on September 30, 1993 **conclusively terminated the attorney-client relationship.**

As provided in the Fee Contract, upon termination of the Fee Contract all sums then due and owing to Law Firm for Law Firm's services and costs advanced, to that time, became payable on September 30, 1993. **(Exhibit: Fee Contract at 2a, Last Paragraph).** Thus Law Firm's claim accrued no later than September 30, 1993 not only because the grant of its motion to withdraw but also because of the said provision in the Fee Agreement. (It should be noted that the Trial Court did not decide the date of the last proper billing in the account as ordered by the Supreme Court.)

Ultimately Bakshi and his businesses lost all of the litigation for which Law Firm was retained. Law Firm has billed Bakshi \$175,839.87 between 1989 and

1993. Law Firm reduced it's billings to Bakshi by about \$20,782.44 as a part resolution of billing disputes. Law Firm had received \$92,293.94 in fees & costs from Bakshi and his businesses.

### RETURN OF BAKSHI'S FILES

In October 1993, Bakshi requested his file from Law Firm since the Court of Appeals had given Bakshi 21 days to retain a new counsel. Law Firm's paralegal reviewed the file to determine which materials would be provided to Bakshi. On November 12, 1993, Seyburn sent Bakshi a bill, which included charges for these activities, as follows:

- 10/10/93      Review file to determine what to keep and what to return to client; draft memorandum regarding same;
- 10/11/93      Complete review of file to determine what to send back to client; copy pleading indexes and correspondence;
- 10/12/93      Review and revise memorandum regarding file . . .

Law Firm charged Bakshi \$182 for these activities, plus \$250 for photocopying. Bakshi did not pay this bill, and the unpaid balance on Bakshi's account allegedly was then \$55,723.

Law Firm knew in October 1993 that as per then applicable **Ethical Standards CI-845 (Exhibit at 29 b)** when a former client requests his legal file, the lawyer has an ethical duty to deliver the original file to the former client or the former client's newly retained counsel and that the former lawyer may retain a photostatic copy of the client's file, however, it would be inappropriate to charge

the client or successor counsel photocopy charges, unless the client or successor counsel consent.

Law Firm also knew in October 1993 that as per then another applicable **Ethical Standards CI-926 (Exhibit at 31 b)** the former lawyer may not charge the client reasonable copy costs without the client's consent. Footnote 2

2

Law Firm did not ask for Bakshi's consent or Bakshi (or any one else on Bakshi's behalf) did not consent at any time for paying for any charges, including photocopying charges to the Law Firm when Bakshi requested his files after the Court of Appeals has terminated the attorney-client relationship.

Thus Law Firm's said post October 8, 1993 billings were in violation of then applicable ethics standards CI-845 and CI-926 and were improper for any purpose

(It is very significant to note that in pursuant of the Supreme Court's order, the Trial Court in 2006 disallowed the above three charges totaling \$182.00 and ordered Law Firm to remove these charges (which Law Firm did not) for the reason that applicable ethics regulations in 1993 did not allow the attorney to charge for copying & returning client's files. As a result Law Firm does not have any proper billings post October 3, 1993.)

**Exhibit at 8 b**

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<sup>2</sup> Under present Michigan Ethics Regulations R-19 (August 2000), a law firm may properly charge for returning former client's file. However these charges after the termination of the attorney-client relationship to a former client (or a new counsel) are based on implied promise that to pay for such services is not based on original attorney-client relationship. This provision is primarily for the protection of the attorney to avoid the former client from extending accrual period for a potential malpractice claim. In the instant case however then existing rules CI- 845 and CI-926 in 1993 prohibited such charges except in case of an express provision in fee agreement to pay for such house keeping charges. It is important to note that no such provision for payment of such housekeeping services exists in the Fee Contract that Law Firm seeks to enforce

## LEGAL MALPRACTICE CASE

In 1995, Bakshi brought a legal malpractice action against Law Firm, claiming, inter alia, that he should be relieved of his obligation to pay Law Firm for negligently performed legal services in the prior unsuccessful Interface Litigation. In a motion for summary disposition, Law Firm argued that Bakshi's action was barred in part by the two-year statute of limitations for malpractice claims, MCL 600.5838(1). **Contrary to the position that Law Firm takes in the instant litigation in a sworn 2000 affidavit, Law Firm represented in an 1995 affidavit** that it last performed legal services for Bakshi on March 3, 1993, and that it "discontinued" providing legal services to Bakshi on April 27, 1993 (the latter date refers to the date it drafted its motion to withdraw as counsel). The Trial Court (Judge Andrews) commented in its 1996 opinion that "[Law firm was] hired for the particular purpose of representing [Bakshi] and did not discontinue serving [Bakshi] with respect to those matters until October 1993 . . . ." (**Exhibit: Judge Andrews' opinion 1/31/1996 at 19 b, Last paragraph to 20 b, 1<sup>st</sup> paragraph**). The Trial court dismissed the malpractice action in 1999, and the Court of Appeals affirmed the dismissal on August 10, 2001 (Docket No. 220867). The Michigan Supreme Court denied leave to appeal.

**JUDGE ANDREW' FINDINGS IN LEGAL MALPRACTICE CASE  
NOT DISPOSITIVE IN INSTANT CASE AS PER SUPREME COURT**

It is very significant to note that as held by the Supreme Court later, the Trial Court (Judge Andrews) in the malpractice case did not make findings that the activities underlying Law Firm's 1993 October billings were for Bakshi's benefit or were proper under the Fee Agreement or were proper or not in violation of ethics standards or Law Firm's representation continued until any particular date in October, 1993, (a very crucial determination for the legal fees case, which was later filed by the Law against Bakshi on October 8, 1999). In any event the Supreme Court has made a determination that Judge Andrews' finding in malpractice case is non dispositive in the instant case.

**Exhibit: Judge White's 2003 opinion at 54a, Paragraph 2**

In the instant case Law Firm has successfully mised the majority judges in the Court of Appeals by (falsely) asserting that Judge Andrews did make a finding in the 1995 malpractice case that Law Firm's representation continued until the particular date October 12, 1993. (Opinion later vacated by the Supreme Court)

**Exhibit: Majority 2003 opinion at 52a First paragraph, last 5 lines**

**Exhibit: Majority 2003 opinion at 51a Last paragraph,**

**Exhibit: Majority 2003 opinion at 53a Last paragraph**

## **LAW FIRM'S COMPLAINT IN THE INSTANT CASE**

After the Court of Appeals granted Law Firm's motion to withdraw on September 30, 1993 Law Firm waited more than 6 years to file its complaint in the instant action for unpaid legal fees on October 8, 1999. It is significant to note that Law Firm waited approximately 7 years after Bakshi refused to make any further payments from November, 1992 to file the instant case for breach of contract (Fee Contract)

### **EXHIBIT: Law Firm's Complaint at 1a-2a**

Instead of filing its counterclaim for the unpaid fees in the pending 1995 malpractice case, Law Firm opted to file an independent law suit by falsely certifying that there was no other pending or resolved civil action in its complaint and summons. In the complaint Law Firm sought to recover their own office expenses in withdrawing from Interface Litigation then pending in the Michigan Court of Appeal and their own office expenses in securing the return of Bakshi's business litigation files after the Law Firm was discharged by the Court of Appeals on September 30, 1993. As per Fee Contract, Bakshi was not obligated to pay these expenses.

### **BAKSHI'S MOTION FOR SUMMARY DISPOSITION OF LAW FIRM'S COMPLAINT IN TRIAL COURT (April 16, 2000)**

Bakshi moved for summary disposition pursuant to MCR 2.116(C) (7), arguing that the six-year statute of limitations, MCL 600.5807(7) (now MCL 600.5807(8)), had expired. He maintained that Law Firm claim accrued in November 1992, when he ceased to make payments and disputed the remaining

balance. In response, again contrary to the position it took in the malpractice case in the 1995 sworn affidavit that Law Firm provided last legal services to Bakshi on March 3, 1993 and discontinued providing services to Bakshi on April 27, 1993, Law Firm asserted by relying on its new, totally contradictory 2000 affidavit that it last performed legal services on October 12, 1993.

**Exhibit: Law Firm's 2000 affidavit at 10 b**

In 2001, the trial court granted Bakshi's motion for summary disposition based on the 6 year statute of limitations, and held that Seyburn's action accrued in 1992, when Bakshi stopped paying Seyburn's legal fees.

**1<sup>ST</sup> APPEAL IN THE COURT OF APPEALS  
(Filed by Law Firm, COA Docket # 238697)**

Law Firm appealed the decision to the Court of Appeals. Bakshi asserted that Law Firm's billings for activities after March 1993 were not billings under fee Contract or on open account, but rather, were solely for Law Firm's own benefit.

In response, Law Firm successfully the majority judges in the Court of Appeals by (falsely) pleading that the Trial Court in the malpractice action found that the Law Firm last rendered legal services to Bakshi on October 12, 1993 and that determination controlled the instant matter. Unfortunately the majority Judges adopted this clearly erroneous statement. (In fact the Trial Court in the malpractices case never made a finding that the Law Firm last rendered legal services to Bakshi on October 12, 1993 as later found by the

Supreme Court). Relying on assertion in Law Firm's pleadings and Gold's 2000 contradictory affidavit, the majority Judges J. Kelly and J. Hoekstra in a split decision agreed with Law Firm that its action was timely filed because its claim accrued on October 12, 1993, the last date it performed a properly billable service. The majority noted that the Trial Court (J. Andrews) in the 1995 malpractice action found that the law firm last rendered legal services to defendant on October 12, 1993, and that determination controlled in the instant case and ruled that the Trial Court improperly granted summary disposition. (Decision was later vacated by Supreme Court)

**Exhibit:** Majority 2003 opinion at **52a First paragraph, last 5 lines**

**Exhibit:** Majority 2003 opinion at **51a Last paragraph,**

**Exhibit:** Majority 2003 opinion at **53a Last paragraph**

Judge White, however, issued a separate concurring/dissenting opinion, which agreed with the majority's conclusion that summary disposition was improperly granted for Bakshi. However, the dissenting Judge White wrote that the matter should be remanded to the trial court to determine whether "there was a proper action on an open account," and, if so, the date of the last proper billable entry. In this regard, the dissenting judge opined that the Trial Court should have considered whether Law Firm could ethically and legally charge Bakshi for the tasks it performed in October 1993 in relation to his request for a copy of his file. She also found that the October dates were not

necessarily dispositive of the question of when Seyburn's claim accrued in the instant case. ( **Exhibit:** Judge White's 2003 opinion at **54a Second paragraph and at 54a Last line to 55a**)

**1<sup>ST</sup> APPEAL TO SUPREME COURT**  
**(Filed by Bakshi, SCt # 123852)**

Bakshi thereafter filed an application for leave to appeal with the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals' decision by adapting Judge White's opinion in its entirety and remanded for further proceedings for the reasons stated in Judge White's concurring/dissenting opinion. (**Exhibit:** Supreme Court Order at **56a**)

Judge White determined that the finding of the Trial Court in the malpractice case is not dispositive in the instant case and the Trial Court in the malpractice case did not make a finding that Law Firm's representation continued until any particular date in October, a crucial determination in the instant case, which was filed October 8, 1999. The dissenting Judge White wrote that the matter should be remanded to the trial court to determine whether "there was a proper action on an open account," and, if so, the date of the last proper billable entry. In this regard, she further opined that the trial court should have considered whether Law Firm could ethically and legally charge Bakshi for the tasks it performed in October 1993 in relation to Bakshi's request for a copy of his file. However, she also commented that the October dates were not necessarily dispositive of the question of when Seyburn's claim accrued.

**Exhibit:** Opinion of Judge White adapted in entirety by the Supreme Court at 54a-55a

**ON REMAND TRIAL COURT FINDS  
LAW FIRM'S POST OCTOBER 8, 1993 BILLINGS  
IN VIOLATION OF ETHICS STANDARDS**

On remand, the trial court held a hearing on the statute of limitations issue on April 26, 2006. As stated above, Law Firm's paralegal reviewed the file to determine which materials would be provided to Bakshi. On November 12, 1993, Law Firm sent Bakshi a bill, which included charges for these activities, as follows:

- 10/10/93      Review file to determine what to keep and what to return to client; draft memorandum regarding same;
- 10/11/93      Complete review of file to determine what to send back to client; copy pleading indexes and correspondence;
- 10/12/93      Review and revise memorandum regarding file . . .

Law Firm charged Bakshi \$182 for these activities, plus \$250 for photocopying. As stated Law Firm's said post October 8, 1993 billings were in violation of then applicable ethics standards CI-845 and CI-926 and **were improper for any purpose.** (Exhibits at 29 b and 31 b)

Pursuant to the Supreme Court's order the Trial Court at the hearing on April 26, 2006 reviewed applicable 1993 ethics standards and disallowed the above three charges totaling \$182.00 and ordered Law Firm to remove these charges (which Law Firm did not) for the reason that applicable ethics regulations CI-845 and CI-926 in 1993 did not allow the attorney to charge for copying & returning client's files. As a result Law Firm does not have any billing proper or otherwise post October 3, 1993. (The Trial Court should have but did not remove

the copying charges of \$250.00). **Law Firm did not appeal the Trial Court's said finding. Further the Trial Court failed to determine any specific last properly billable date as ordered by the Supreme Court on remand.**

Contrary to the Supreme Court's order on remand, the Trial instead of deciding Bakshi's motion for summary disposition went on to hold a bench trial which was not before him on the day/

**LAW FIRM IMPROPERLY OBTAINED JUDGMENT  
OF \$510,405.07 IN CONTRACT INTEREST CLAIM**

**CONTRACT INTEREST NEVER OWED, BILLED OR PLEADED AT ANY TIME**

On August 2, 2006 in the Trial Court Law Firm obtained a judgment by misrepresenting its Contract Interest claim which was never asserted for over 16 ½ years prior to April 26, 2006. Judgment was for \$510,405.07 in Contract Interest on the alleged unpaid principal amount of \$62,763.49 pursuant to the following provision in the Fee Contract.

.“--- Any amounts not received by my Attorneys within thirty (30) days will accrue a carrying charge of 18% per annum (1 – 1/2 % per month) -- “

**EXHIBIT: Attorney Fee Agreement, at 1a Paragraph 3**

As stated herein, shortly after the Fee Contract was entered into in November 1989, Law Firm and Bakshi removed the Contract Interest provision in the original Attorney Fee Agreement in early 1990. Accordingly, Law Firm never claimed, charged, billed or demanded any Contract Interest (carrying charges) in any manner at any time on amounts not received by Bakshi's Attorneys within

thirty (30) days during the entire attorney-client relationship from 1989 to 1993, in its statement dated June 16, 1994 or anytime thereafter until April 2006. Law Firm did not assert or plead any Contract Interest in the instant case filed in 1999 or pleaded as special damages in the instant case.

Law Firm surprised Bakshi at the hearing for his motion for summary disposition in the Trial Court before Judge Schnelz on April 26, 2006 by asserting a brand new claim for Contract Interest for the very first time, without a motion or without a notice to Bakshi some 12 ½ years after the law Firm was discharged on September 30, 1993. Bakshi denied Law Firm's all claims for money damages at the hearing by stating that no money was owed by Bakshi. (**Exhibit:** Transcript of 4/26/2006 at **86 a, Lines 10 to 16**). It is significant to note that the Contract Interest claim was asserted by Law Firm for the very first time on April 26, 2006, 6 ½ years after the law Firm had filed its complaint on October 8, 1999 in the instant case. Later at the hearing in the Trial Court on August 2, 2006 Law Firm revised its contract interest claim to \$510,405.07. Law Firm continued to prosecute the claim for the Contract Interest in the amount of \$510,405.07 in the pleadings in the Court of Appeals and then during the oral arguments in the Court of Appeals on November 14, 2007. The Court of Appeals did not adjudicate this issue since it found Law Firm's claim was time barred.

### **MAJOR CONTRADICTION IN TRIAL COURT'S FINDING ON REMAND**

After disallowing said October 10, 11 and 12 1993 billings for being in violation of ethics standards the Trial Court determined that Law Firm performed

the additional work in October 1993, at Bakshi's request, and for Bakshi's benefit, and that Law Firm could ethically charge Bakshi for those services. From this, the court reasoned that the limitations period did not begin to run until October 12, 1993, and thus held that Law Firm's action, filed on October 8, 1999, was timely filed within the six-year period of limitations. MCL 600.5807(8) (formerly MCL 600.5807[7]). Thus, the trial court determined that Bakshi was liable for legal fees of \$62,763, and that Law Firm was entitled to interest of \$510,405.07, as of August 16, 2006.6. It issued judgment ordering Bakshi to pay Seyburn \$573,168.07.

**2<sup>ND</sup> APPEAL IN THE COURT OF APPEALS  
(Filed by Bakshi, COA Docket # 272903)**

Bakshi appealed the Trial Court's judgment. The Court of Appeals reversed the Trial Court and ruled for Bakshi on the basis that Law Firm's Claim was time barred pursuant to the 6 year statute of limitation and that Law Firm's claim accrued no later than September 30, 1993 and since Law Firm's claim was filed on October 8, 1999, it is time barred.

Each of three judges on the Court of Appeals' panel was very offended and concerned about Law Firm's two contradictory affidavits as to the last date of Law Firm's legal services to Bakshi.

**Exhibit:** Opinion of the Court of Appeals,  
**at 104a, Last paragraph, starting 5<sup>th</sup> line and**  
**at 105a, first paragraph, starting 5<sup>th</sup> line**

There are three different versions of the alleged date of the last legal services to Bakshi provided by Law Firm.

1. As stated herein, in the 1995 affidavit of Attorney Gold on behalf of Law Firm has affirmed that the last legal services Law Firm performed

for Bakshi with regard to any matters was on **March 3, 1993** and Law Firm discontinued providing legal services to Bakshi as of **April 27, 1993** (When Law Firm drafted motion to withdraw). In support of this affidavit Law Firm attached and relied on its invoices dated 4/21, 5/7, 8/11, 9/22 and **November 12, 1993** invoices.

**Exhibit:** 1995 affidavit of Law Firm, at ---b, paragraph 6

2. Later in the 2000 Attorney Gold on behalf of Law Firm filed a totally contradictory affidavit affirming that the last billable legal services provided to Bakshi were as of **October 12, 1993**. It is very significant to note that in support of this affidavit Law Firm relied on the same invoice dated **November 12, 1993** invoices as before when it relied on the same **November 12, 1993** invoice in support of its 1995 affidavit.

**Exhibit:** 1995 affidavit of Law Firm, at 8 b,

3. It is significant to note that at hearing on August 2, 2006 in the Trial Court Gold has asserted under oath yet another date of **November 23, 1993** as the last date of legal services provided by the Law Firm to Bakshi.

“And then we calculated the interest, we began with **November 23, 1993**, that’s when our services ended - - -“

**Exhibit:** Transcripts of 8/2/2006 at 37b, Lines 20-22

Each judge repeatedly questioned Law Firm’s attorney Powers about the contradictory affidavits which Powers could not explain. The Court of Appeals’ opinion of April 1, 2008 has repeatedly noted the contradictory affidavits.

**Exhibit:** Opinion of the Court of Appeals,  
at 104a, Last paragraph, starting 5<sup>th</sup> line and  
at 105a, first paragraph, starting 5<sup>th</sup> line

## CONCLUSION

This case would not have dragged on for more than 9 years had the Law Firm honestly represented the following factual statements:

1. Shortly after the Fee Contract was entered into in November 1989, Law Firm and Bakshi verbally modified the Fee Contract by agreeing to remove the Contract Interest clause in the original Fee Contract. Accordingly, **Law Firm never charged, billed or demanded any carrying charges in any manner at any time** from Bakshi on amounts not received by Law Firm within thirty (30) days during the entire 4 year attorney-client relationship from 1989 to 1993 or thereafter.
2. Bakshi has breached the Fee Contract from November 1992 onwards by refusing to make any further payments to Law Firm
3. Law Firm's legal services to Bakshi ended on March 3, 1993 as affirmed by Law Firm in 1995 affidavit
4. Law Firm's discontinued providing legal services to Bakshi on April 27, 1993 as affirmed by Law Firm in 1995 affidavit
5. Attorney-Client relationship was irrevocably broken as asserted by Law Firm in its withdrawal motion drafted on April 27, 1993 and filed on July 30, 1993.

6. Judge Andrews in 1995 malpractice did not make a finding that Law Firm's services to Bakshi continued until October 12, 1993 (Supreme Court's finding)
7. It was unethical for the Law Firm to bill Bakshi in October 1993 for housekeeping services for returning his case file.
8. Ethics Opinion R-19 of August 2000 has no retroactive application in this case.

From this tortious and prolonged litigation Bakshi seeks to have this case remanded to the trial court for the entry of the judgment in his favor.

For the above reasons, Bakshi asks this Court to affirm the decision of the Court of Appeals and remand the case for entry of summary judgment in favor of defendant-appellee, Kirit Bakshi with costs, attorney fees from the date of filing of the complaint on October 8, 1999 and any other relief this Court deems appropriate.

Alternatively for the reasons stated herein Bakshi asks this Court to remand the case to the Court of Appeals to adjudicate issues properly raised by Bakshi before the Court of Appeals but were not adjudicated for the reasons stated herein.

## ARGUMENT

The principal issue is whether Plaintiff-Appellant's (Law Firm) action is barred by limitations. This Court reviews decisions on whether a claim is barred by limitations de novo. Scherer v Hellstrom, 270 Mich App 458, 461; 716 NW2d 307 (2006).

### I DETERMINATION OF MULTIPLE ISSUES MADE BY THE MICHIGAN SUPREME COURT IN ITS 2003 OPINION IN THE INSTANT CASE IS BINDING AND CONTROLLING AUTHORITY FOR THE INSTANT CASE

On November 13, 2003, in lieu of granting Bakshi leave to appeal, the Supreme Court vacated the Court of Appeals' decision by adopting the Judge White's opinion in its entirety and remanded for further proceedings for the reasons stated in Judge White's concurring/dissenting opinion. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 469 Mich 958; 671 NW2d 875 (2003). This opinion is the controlling authority for the instant case.

Judge White made the following significant findings among others: **(Exhibit at 54a to 55a)**

- The finding of the Trial Court (Judge Andrews) in the 1995 malpractice case is not dispositive in the instant fee case
- The Trial Court in the 1995 malpractice case did not make a finding that Law Firm's representation of Bakshi continued until any particular

date in October, a crucial determination in the instant case, which was filed October 8, 1999.

The dissenting Judge White wrote that the matter should be remanded to the trial court to determine whether “there was a proper action on an open account” and, if so, the date of the last proper billable entry. In this regard, she further opined that the trial court should have considered whether Law Firm could ethically and legally charge Bakshi for the tasks it performed in October 1993 in relation to Bakshi’s request for a copy of his file. However, she also commented that the October dates were not necessarily dispositive of the question of when Seyburn’s claim accrued.

**Exhibit: Judge White’s opinion at 54a-55a**

Law Firm has repeatedly made averments and legal arguments in its brief which are totally inconsistent or contradictory to the above findings made by the Supreme Court. These averments and legal arguments as well as the Trial Court’s subsequent findings <sup>Foot Note 1</sup> contrary to Justice White’s findings have no effect or application in this case and should not have any effect or application in the instant case.

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<sup>3</sup> In his opinion in the OCCC # 2008-091137-CZ case, Judge Andrews revised and added to his own 12 year old 1996 opinion in the 1995 malpractice case the following “New Findings” which were not to be found anywhere in his said 1996 opinion on plain reading or otherwise 19 b, Last paragraph to 20 b First paragraph) and contrary to the Supreme Court’s determination in this case.

“ - - - two prior decisions, including one by this Court (Judge Andrews’s decision in 1995 malpractice action), found that the crucial date for

II

**LAW FIRM'S REPEATED RELIANCE ON ETHICS OPINION R-19 (AUGUST 2000) IN ITS BRIEF IS NOT RETROACTIVELY APPLICABLE TO THE CIRCUMSTANCES IN OCTOBER 1993 IN THE INSTANT CASE**

Law Firm is misleading the Court by erroneously claiming its right to bill Bakshi for house keeping services in returning Bakshi's case file, after the attorney-client relationship was terminated by the Court of Appeals, by its retroactive application of ethics regulation R-19 which came in existence in August 2000. Therefore R-19 has no application in this case. It should be noted

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*determining when the statute of limitations began to run, was the last date of services to Bakshi, October 12, 1993. In this regard, this Court notes its own findings that Seyburn could ethically charge Bakshi for review and copying of his file, and that the limitations period did not begin to run until October 12, 1993. - - -"*

**Exhibit: 117a, last paragraph continued on 118a**

*(Footnote continued on next page)*

It is very significant to note that the SAID NEWLY ADDED FINDINGS by Judge Andrews to his own 1996 judgment were totally contrary to the Supreme Court's following findings in 2003 by which Judge Andrews was bound and was not at liberty to alter findings of the Supreme Court. Judge Andrews in 2008 contradicted the following findings of the Supreme Court's:

- Determination made in the 1995 malpractice action is not dispositive in the 1999 fee action
- In 1995 malpractice case, Judge Andrews did not make a determination that the Law Firm's billings in October 1993 were proper
- Additionally in 1995 malpractice case Judge Andrews did not make a finding that Law Firm's representation continued until any particular date in October, a crucial determination in the 1999 fee case since the fee case was filed on October 8, 1999.

**Exhibit :** 2003 Opinion of Judge White adapted in entirety by the Supreme Court, **54a-55a**

Relying on his "new findings" and ignoring determination by the Supreme Court Judge Andrews granted Law Firm's motion for summary disposition. Case was later settled by stipulation.

that then applicable ethics regulations CI-845 and CI – 926 in October 1993 prohibited Law Firm charging Bakshi for said house keeping services.

Further the Court of Appeals did not adjudicate this issue since the post termination house keeping services did not extend the period of the already terminated attorney-client relationship.

“Bakshi maintains that Ethics Opinion R-19 does not govern these circumstances, because it was not decided until after Seyburn attempted to bill him for activities related to copying the file. He argues that prior ethics opinions, issued before October 1993, supported his position that the billing was improper. Bakshi’s argument raises questions concerning the retroactivity of ethics opinions and the application of prior opinions to the October 1993 billing. However, it is unnecessary to resolve these questions because the salient question is not whether the October 1993 billings were proper and permissible, but whether they extended the period of the attorney-client relationship”

**Exhibit:** 2008 Opinion of Court of Appeals at **110a**,

**Footnote 11**

### III

#### **LAW FIRM’S ACTION WAS NOT BROUGHT TO RECOVER THE BALANCE DUE UPON A SINGLE MUTUAL AND OPEN ACCOUNT**

Law Firm is misleading this Court now by arguing that its action was brought to recover the balance due upon a single mutual and open account and therefore its services rendered after the termination of the client – attorney relationship are items proved in the account, i. e are billed properly. However Law Firm’s single count action filed on October 8, 1999 is for the breach of Fee Contract and seeks \$62,763.49 in unpaid legal fees plus costs and attorney fees

(5a).

As late as on April 26, 2006 at the hearing on remand from Michigan Supreme Court when the Court asked "Was it open account?" Attorney Powers for Law Firm answered "No" and emphasized that there is one count in the complaint which is for breach of contract. **(62a Lines 18 to 24)**. Thus for at least for 6 ½ years (i. e until April 26, 2006) after filing it's complaint on October 8, 1999, Law Firm has maintained that it's claim is based on the breach of the Fee Contract.

In any event, in this case the determination of whether the Law Firm's action is barred by 6 year statute of limitation does not depend on the issue of whether or not Law Firm's action is based on a breach of the contract claim as repeatedly asserted by the Law Firm until at least April 2006 or on a single open and mutual account as now being asserted by Law Firm first time after April 2006 because in either case accrual date for a contract for legal services or on an open and mutual account for legal services are the same. **In either case the claim accrues at the time of the last item proved in the account:** i.e. the accrual date is the date of the last proper billing for service(s) under the contract or mutual understanding. This accrual date is further expressly set forth in Michigan statute MCL 600.5831. *Dei's Estate, 293 Mich 651, 656-658; 292 NW 513 (1940)*.

In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item **proved** in the account.

Here the relationship between parties started with the written Fee Agreement. Law Firm provided some services. Bakshi paid for some of the services. There was a running balance in the account. Billing disputes arose. Law Firm made some adjustments made. Billing disputes continued. Bakshi ceased making payments in November 1992 and informed law Firm that he will not make further payments. At this point mutuality was broken, i. e. the relationship between parties was no longer mutual or continuous. (See continuous wrong or services theory: *Blazer Foods v Restaurant Properties, Inc.*, 259 Mich App 241, 673 BW2nd 805(2003), *Maddox V. Burlingame*, (205 Mich App 446, 450: 517 NW2nd 199), *Burch v Woodworth*, 68 Mich 519; 36 NW 721 (1888), *r v Carter*, 36 Mich 207 (1877), *Wisniewski v Wisniewski's Estate*, 254 Mich 663; 236 NW 899 (1931)).

. Law Firm acknowledged this complete breakdown of the attorney-client relationship by drafting its motion for withdrawal on April 27, 1993 and discontinuing its services to Bakshi on April 27, 1993 and moving in the Court of Appeals to withdraw. Yet here the Law Firm improperly argues that the open and mutual account continued even after the attorney-client relationship was terminated by the Court of Appeals on September 30, 1993. *Pellettieri, Rabstein & Altman v Protopapas*, 383 NJ Super 142, 149 n 7; 890 A2d 1022 (NJ App, 2006) *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002).

“On July 30, 1993, Seyburn moved in this Court to withdraw as Bakshi’s counsel. It stated that Bakshi was “indebted to counsel for fees and costs incurred at the trial court level as well as fees associated with the appeal,” and that he “has indicated that it is not willing to pay the outstanding fees or costs.” Seyburn also alleged in the withdrawal motion that the attorney-client relationship between itself and Bakshi was “subject to irreconcilable differences and has broken down to such an extent that counsel can not effectively represent [Bakshi’s] interest in this appeal. This Court granted the motion to withdraw on September 30, 1993.”

**Exhibit: 2008 April Court of Appeals opinion 104a, 2<sup>nd</sup> Paragraph**

Further Law firm is using its billing method as the basis for determining its accrual date by lumping its invoices billed under the Fee Contract between the parties and its claims for payment of expenses and services rendered after the date of its admitted last legal services to Bakshi on March 3, 1993 and also with the claims for services and expenses after the termination of Fee Contract and termination of attorney-client relationship

“6 That the last legal services that Defendants [Law Firm] performed for Plaintiffs [Bakshi] with regard to any matters was on March 3, 1993 and defendants [Law Firm] discontinued providing legal services to Plaintiffs [Bakshi] as of April 27, 1993”

**Exhibit: 1995 Affidavit of attorney Gold on behalf of Law Firm,  
At 2 b. Paragraph 6)**

It should be noted that In support of said 1995 affidavit Law firm has attached and relied on its five invoices dated 4/21, 5/7, 8/11, 9/22 and **November 12, 1993** to affirm that the last legal services that Law Firm performed for Bakshi

with regard to any matters was on March 3, 1993 and Law Firm discontinued providing legal services to Bakshi] as of April 27, 1993. Further the other post March 3, 1993 matters reflected in these invoices were clearly matters:

1. For which there was no agreement to pay
2. For which there was no mutual consent to pay
3. Its billings in October 1993, after the attorney – client relationship was terminated by the Court of Appeals on September 30, 1993, were in violation of then existing ethics regulations CI-845 and CI-926
4. Its billings of October 10, 11 and 12, 1993 totaling to \$182.00 (120+60+12=182) were expressly disallowed by the Trial Court at the hearing on April 26, 2006 for they being in violation of then applicable ethics regulations CI-845 and CI-926.

**Exhibits: 83a, Line 18 to 84a, Line 13 and  
75a, Line 18 to 77a, Line 13**

Law Firm's accounting or billing practices and Law Firm's repeated assertion that these activities (which Law Firm itself describes as) are not billings under Fee Contract (**Exhibit: Law Firm's pleadings in malpractice case COA ,Docket # 203885 at 24 b, Last paragraph and Exhibit: Law Firm's pleadings in malpractice case COA Docket # 220867 at 28 b, Last paragraph**), and therefore these activities cannot extend an otherwise proper determination that Law Firm's accrual date for its legal services properly billed under a mutual and express agreement to pay for such litigation services beyond the date the Court of Appeals relieved Law Firm of its contractual obligation to Bakshi by its order of September 30, 1993 and therefore all of Law Firm's claims arising from this express contract and mutual agreement to pay for litigation services on open account basis would have to be filed no later than September 30, 1999. *Kloian v Schwartz*, 272 Mich App 232, 238; 725 NW2d 671 (2006) , *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999). It should be re-noted that Law Firm has affirmed in its 1995 affidavit that it provided last legal services to Bakshi as of March 3, 1993 (**Exhibit: at 2 b, Paragraph 6**) and has

repeatedly pleaded that it's services post June 30, 1993 were not legal services under fee contract as stated above.

However this determination does not affect Law Firm's claims to be compensated for expenses and services rendered after termination of attorney client relationship provided such services were proper under then applicable ethics rules CI – 845 & CI -926 or were expressly provided in the Fee Contract. It should be noted that these ethics rules prohibited such expenses for housekeeping services without the former client's express consent. No such consent or prior express agreement was present in this case.

All Law Firm's cases cited affirm the principle that the accrual date for the services must be based under the continuous contract or mutual consent of the attorney and client.

*In Dei's Estate, 293 Mich 651, 656-658; 292 NW 513 (1940)* the critical fact for permitting the attorney claim for his services was that in Dei (Supra) the attorney-client relationship was neither broken nor terminated by a court order.

#### IV

#### **MCL 600.5831 APPLIES TO AN ACTION BY AN ATTORNEY AGAINST HIS CLIENT TO RECOVER UNPAID LEGAL FEES ONLY FOR ITEMS PROVED IN THE ACCOUNT**

Neither the majority nor minority opinion of the Court of Appeals dated April 1, 2008 decision in this case is inconsistent with MCL 600.5831 or the prior existing case law of the State of Michigan as reflected in H. J. Tucker (234 Mich App 552, 562 and Dei's (Supra) for the reason that not only must the billing be over a continuous period but the items billed must be under the same contract agreement or mutual understanding: i. e. billed items have to be proved in the account.

Also Law Firm's assertion that accrual statute MCL 600.5831 significantly differs from accrual statute MCL 600.5827 is misleading and without any merit since MCL 600.5827 provides that claim accrues at the time provided in MCL 600.5829-.5838 which also includes MCL 600.5831.

Further no case or authority has been cited by the Law Firm in Michigan or any other jurisdiction which allows a law firm (or an attorney) to extend accrual date under an open account for legal services by simply manipulating its invoices to include legal services not expressly agreed to in a contract or rendered after the termination of attorney-client relationship or mutually agreed to by the parties.

## V

### A LEGAL SERVICE PERFORMED AFTER THE TERMINATION OF AN ATTORNEY-CLIENT RELATIONSHIP CAN BE "THE LAST ITEM PROVED IN THE ACCOUNT" UNDER MCL 600.5831 UNDER CERTAIN CIRCUMSTANCES.

There is no doubt a legal service performed after termination of attorney-client relationship can under certain circumstances be the last item proved in the account under MCL 600.5831.

Such circumstances would require the express mutual understanding of parties for such services to be paid for in the same manner as for the legal services performed before the termination of the attorney-client agreement: i.e. There must be an agreement, mutuality and continuity.

In this case none of the following applies:

1. No express agreement in Fee Contract to pay for such post termination house keeping services.
2. At the time post termination services were rendered there was no negotiation or discussion as to the cost of said house keeping services
3. There was no mutuality of obligation to pay
4. Then applicable ethics regulations CI-845 and CI – 926 in October 1993 prohibited Law Firm charging Bakshi for said house keeping services

Further, none of the cases cited by the Law firm support a contradictory position as stated above.

As before here also Law Firm is misleading the Court by erroneously claiming its right to bill Bakshi for post termination house keeping services by retroactive application of ethics regulation R-19 which came in existence in August 2000 to the circumstances of October 1993 and therefore has no application in this case. It should be noted that then applicable ethics regulations CI-845 and CI – 926 in October 1993 prohibited Law Firm charging Bakshi for said house keeping services

Also Law Firm erroneously and improperly relies on opinion of Judge Andrews in 1995 malpractice case action although the Michigan Supreme Court in its 2003 opinion has ruled that the determination made in the malpractice case is not dispositive in the instant case. **(Exhibit 54a, Second Paragraph).**

Here Law Firm erroneously asserts that Judge Andrews by allowing Bakshi's legal malpractice action as not barred by 2 year statute of limitation as the basis for similarly claiming that the Law Firm's claim here should not be barred by 6 year statute of limitation. Judge Andrews ruled that Bakshi's claimed filed in July 1995 was within the 2 years of statute of limitation.

Further Law Firm is again misleading the Court by asserting that Judge Andrews relied on the October 12, 1993 as accrual date, just like it successfully misled majority judges in the Court of appeals in 2003, COA Docket # 238697, **Exhibit: 52a, 1<sup>st</sup> Paragraph, Last 3 lines**). The Michigan Supreme Court in its 2003 opinion in this case has already determined that judge Andrews did not make a finding in the malpractice case that Law Firm's representation continued until any particular date in October 1993, a crucial determination for 6 year statute of limitations in the instant case, which was filed on October 8, 1999.

"Additionally, the court did not make a finding that representation continued until any particular date in October, a crucial determination in the instant case, which was filed October 8, 1999."

**Exhibit: Judge White's Opinion, (54a, Last line to 55a, 1<sup>st</sup> Paragraph)**

Further, the criteria for determining legal malpractice accrual is simply as to the date attorney rendered its last service to the client or otherwise sought payment for such services(s) and not in addition to whether such services were properly billable under the contract or for which client had a specific mutual understanding for payment. *Basic Food Industries v Grant, 107 Mich App 685, 693; 310 NW2d 26 (1981).*

## VI

### **THERE CAN BE A MUTUAL AND OPEN ACCOUNT AFTER TERMINATION OF AN ATTORNEY-CLIENT RELATIONSHIP UNDER CERTAIN CIRCUMSTANCES.**

There is no doubt that there can be a mutual and open account after termination of an attorney-client relationship under certain circumstances.

Such circumstances would require the express mutual understanding of parties for such post termination services to be paid for in the same manner as for the legal services performed before the termination of the attorney-client agreement: i. e. There must be an agreement, mutuality and continuity.

In this case none of the following applies:

1. No express agreement in Fee Contract to pay for such post termination house keeping services.
2. There was no mutuality of obligation to pay
3. Then applicable ethics regulations CI-845 and CI – 926 in October 1993 prohibited Law Firm charging Bakshi for said house keeping services

Law Firm's is **again** improperly relying on the retroactive application of the ethics regulation R-19 to the events and circumstances of October 1993 in support of its unmaintainable argument. Similarly Law Firm's argument that the closeness of its post termination services somehow extends the period of

attorney-client period and thus extends accrual is also without any merit. The Court of Appeals has correctly decided this issue. (**Exhibit:** Court of Appeals Opinion of April 1, 2008. **110a, Footnote 11**).

Further, none of the cases cited by the Law firm support a contradictory position as stated above.

## VII

### **A CLAIM BY AN ATTORNEY AGAINST HIS CLIENT FOR UNPAID LEGAL FEES ACCRUES ON THE DATE THE ATTORNEY-CLIENT RELATIONSHIP ENDS UNDER MOST CIRCUMSTANCES.**

There is no doubt that a claim by an attorney against his client for unpaid legal fees accrues on the date the attorney-client relationship ends under most circumstances.

Exceptional circumstances would require the express mutual understanding of parties for any post termination services to be paid for in the same manner as for the legal services performed before the termination of the attorney-client agreement: i. e. There must be an agreement, mutuality and continuity. This can be accomplished by adding a proper provision in fee agreement to pay for such services.

In this case none of the following applies:

1. No express agreement in Fee Contract to pay for such post termination house keeping services.

2. There was no mutuality of obligation to pay
3. There was no continuity in the attorney-client relationship.
4. Then applicable ethics regulations CI-845 and CI – 926 in October 1993 prohibited Law Firm charging Bakshi for said house keeping services

Further Law Firm has not cited any authority in support of his argument simply because it does not exist.

## VIII

**THIS ACTION WAS FILED WITHIN SIX YEARS OF DEFENDANT'S FINAL REFUSAL TO PAY FOR SERVICES WHICH WERE PROPERLY BILLABLE OR WITH MUTUAL AGREEMENT BETWEEN PARTIES TO PAY FOR SUCH SERVICES**

As stated before in this case services rendered after March 3, 1993 were, as affirmed in Law Firm's 1995 affidavit, were not services rendered on behalf of Bakshi under Fee Contract or any mutual consent

**Exhibit:** Law Firm's pleadings in malpractice case COA Docket # 203885 at 24 b, Last paragraph

**Exhibit:** Law Firm's pleadings in malpractice case COA Docket # 220867 at 28 b, Last paragraph

Clearly after Law Firm discontinued providing services to Bakshi on April

27, 1993 as admitted in its own 1995 affidavit and certainly after it obtained the order from the Court of Appeals relieving itself of all obligations to Bakshi, there was no continuity of the attorney-client relationship and thus no continuity of legal obligation to pay Law Firm for services rendered after it discontinued its services to Bakshi or for services rendered after the Law Firm was discharged by the Court of Appeals.

The only continuity is that the Law Firm itself created by lumping its pre-termination and post termination services in one invoice as well as services after march 3, 1993 which Law Firm clearly knew that Bakshi has not requested and were not for Bakshi's benefits and were clearly performed without contemplating if Bakshi will be responsible for paying for such services.

Law Firm further erroneously makes no distinction between Bakshi's refusal from November 1992 to pay for services under Fee Contract for which there was a legitimate dispute and Bakshi's refusal to pay for post termination legal services which were unethically billed and for which Bakshi has no obligation to pay.

Law Firm's position boils down to the its claim that Bakshi's refusal to pay as per the foot note in it's allegedly final bill dated November 12 1993 is the trigger point for accrual of Law Firm's fee claim as well as for the contract Interest. This claim is without any merits for reasons including but not limited to the following:

1. Bakshi's final refusal to pay was in November 1992. Law Firm has acknowledged in its withdrawal motion drafted on April 27, 1993

and filed on July 30, 1993 that Bakshi is not willing to pay the outstanding fees or costs. Law Firm also alleged in the withdrawal motion that the attorney-client relationship between itself and Bakshi was "subject to irreconcilable differences and has broken down to such an extent that counsel can not effectively represent Bakshi's interest

**Exhibit: 2008 April Court of Appeals opinion 104a, 2<sup>nd</sup> Paragraph**

2. Law Firm's alleged final bill does not say final bill on it or does not show the final amount of \$62,763.49 as alleged in its complaint filed on October 8, 1999. **(Exhibit 5a)**
3. In spite of The Michigan Supreme Court's order on remand to decide the date of last proper billing, the Trial Court failed to do so. It simply disallowed Law Firm's billings dated October 10, 11 and 12, 1993 for post termination ministerial tasks of returning Bakshi's files for being in violation of then applicable ethics regulations, thus leaving Law Firm without any billing proper or otherwise post October 3, 1993. Law Firm filed its complaint more than 6 years later on October 8, 1999, and thus is time barred.
4. The Court of Appeals did not find it necessary to decide if the Law Firm's billed items in October 1993 for said ministerial tasks were proper since they did not extend the period of the attorney-client relationship. **(Exhibit: Court of Appeals Opinion of April 1, 2008. 110a, Footnote 11)**

5. Law Firm's contention that Bakshi became liable for paying contract interest is not only without any merits but totally bogus. Parties verbally agreed in early 1990 to remove Contract Interest provision. Accordingly Law Firm has never billed, demanded or pleaded Contract Interest at any time prior to April 2006 hearing on remand in the Trial Court.
6. Law Firm's proposition of extending accrual date based on its billing practices is unique in that there is no legal authority cited by the Law Firm to support Law Firm's contention that accrual date can be manipulated by Law Firm's billing or accounting practices.

## IX

**THE DECISION OF THE COURT OF APPEALS DOES NOT OVERRULE ANY SETTLED PRECEDENT OR RULE OF LAW BUT SIMPLY RESTATES EXISTING MICHIGAN LAW THAT A CLAIM FOR AN ATTORNEY'S LEGAL SERVICES PURSUANT TO AN EXPRESS AGREEMENT ACCRUES AS OF THE DATE OF TERMINATION OF ATTORNEY – CLIENT RELATIONSHIP BY AN ORDER OF WITHDRAWAL OF ATTORNEY AND IN THE ABSENCE OF ANY PRIOR WRITTEN AGREEMENT CREATING AN OBLIGATION ON THE PART OF FORMER CLIENT TO PAY FOR ANY POST TERMINATION SERVICES.**

The decision of the Court of Appeals does not overrule any settled precedent or rule of law but simply restates existing Michigan Law that a claim for an attorney's legal services pursuant to an express agreement accrues as of the date of the termination of attorney-client relationship by an order of withdrawal of attorney and in the absence of any prior written agreement otherwise creating an

obligation on part of the former client to pay for such services.

The statute MCL 600.5831 requires that in actions brought to recover the balance due upon mutual and open account current, the claim accrues at the time of the last item proved in the account. Stated otherwise the last item in the account must be properly billable under the account to establish accrual date of the open account or service contract under which open account is created

## X

### **IN THE EVENT THE SUPREME COURT REVERSES THE COURT OF APPEAL AND REINSTATES PLAINTIFF'S CLAIM FOR ATTORNEY FEES BAKSHI IS ENTITLED UNDER DUE PROCESS TO HAVE THIS CASE REMANDED TO THE COURT OF APPEALS FOR ADJUDICATING THE ISSUES RAISED BUT NOT CITED BY THE COURT OF APPEALS**

The Court of Appeals did not adjudicated many properly raised issues by Bakshi simply because it was not necessary for the Court of Appeals to decide these issues once it determined that Law Firm's claim was time barred pursuant to 6 year statute of limitation. Therefore, in the event the Supreme Court reverses the Court of Appeal and reinstates Law Firm's claim for attorney fees, Bakshi is entitled under due process to have this case remanded to the Court of Appeals for adjudicating issues properly raised but not cited by the Court of Appeals.

A partial list of properly raised issues not adjudicated is:

- Trial Court did not determine the date of the last proper billing as ordered by the Supreme Court on remand.
- Bakshi was denied jury trial
- Judge Schnelz ruled on many issues not properly before him at the hearing on April 26, 2006
- Judge Schnelz held a bench trial and decided the case instead of ruling only on Bakshi's motion for the summary disposition
- Fairness of Law Firm's billings

- Retroactive application of R-19 (August 2000) by the Law Firm for the circumstances in October 1993
- Disputed and bogus Contract Interest charges of \$510,405.07

## XI

### **A CONTRACT FOR LEGAL SERVICES IS NOT LIKE OTHER SERVICE CONTRACTS**

Because of the unique and special relationship between an attorney and a client, ordinary contract principles governing agreements between parties give way to the higher ethical and professional standards, and thus a contract for legal services is not like other contracts. *Basic Food Industries (Supra)*

In other contracts either party can terminate a contract without going to a Court. However in service contract for litigation services an attorney must get a court order if he wants to terminate the contract, thus a litigation attorney cannot control the continuity or termination of a legal service contract once the attorney-client relationship is broken. An attorney's ability to withdraw from representation is limited. *Friedman v Dorzac, 412 Mich 1, 57 n 60; 312 NW2d 585 (1981)*

In this case Law Firm discontinued providing services to Bakshi on April 27, 1993, acknowledged a complete breakdown of the attorney client relationship including Bakshi's refusal to make any further payments in its withdrawal motion filed on July 30, 1993, obtained an order for withdrawal on September 30, 1993 and still insists that a legal service contract is no different than other contracts. It should be noted that according to Law Firm Bakshi continued to be obligated to

pay for Law Firm's post termination unethically billed housekeeping charges for returning Bakshi's file.

**Exhibit:** 2008 April Court of Appeals opinion **104a, 2<sup>nd</sup> Paragraph**

## XII

### **CONTRACT INTEREST IN AMOUNT OF \$ 510,405.07 WAS NOT BAKSHI'S LEGAL OBLIGATION TO PAY UNDER FEE CONTRACT OR OTHERWISE**

On August 2, 2006 in the Trial Court Law Firm improperly and fraudulently obtained a judgment for \$510,405.07 in contract interest on the alleged unpaid principal amount of \$62,763.49 pursuant to the following provision in the Fee Contract.

."--- Any amounts not received by my Attorneys within thirty (30) days will accrue a carrying charge of 18% per annum (1 – 1/2 % per month) -- "

**(EXHIBIT: Fee Contract, (1a, Paragraph 3).**

As stated herein, shortly after the Fee Contract was entered into in November 1989, Law Firm and Bakshi removed the Contract Interest provision in the original Attorney Fee Agreement in early 1990. Accordingly, Law Firm never claimed, charged, billed or demanded any Contract Interest (carrying charges) in any manner at any time on amounts not received by Bakshi's Attorneys within thirty (30) days during the entire attorney-client relationship from 1989 to 1993, in it's statement dated June 16, 1994 or anytime thereafter until April 2006. Further Law Firm did not assert or plead any Contract Interest in the instant case filed in 1999 or pleaded as special damages in the instant case.

Law Firm surprised Bakshi by asserting a brand new claim for Contract Interest for the very first time on April 26, 2006, 12 ½ years after the law Firm was discharged at the hearing in the Trial Court before Judge Schnelz in the instant case without a motion or without a notice to Bakshi. Bakshi denied Law Firm's all claims for money damages at the hearing by stating that no money was owed by Bakshi. (Exhibit: at 86a 10 to 16). It is significant to note that the Contract Interest claim was asserted by Law Firm for the very first time on April 26, 2006, 6 ½ years after the law Firm had filed its complaint on October 8, 1999 in the instant case. Later at the hearing in the Trial Court on August 2, 2006 Law Firm revised its contract interest claim to \$510,405.07. Law Firm continued to prosecute the claim for the Contract Interest in the amount of \$510,405.07 in the pleadings in the Court of Appeals and then during the oral arguments in the Court of Appeals on November 14, 2007. The Court of Appeals did not adjudicate this issue since it found Law Firm's claim time barred on the basis of 6 year statute of limitations.

### XIII

**BOTH THE TRIAL COURT AND THE COURT OF APPEALS DID NOT DETERMINE THE DATE OF THE LAST PROPER BILLING AS DIRECTED BY THE MICHIGAN SUPREME COURT ON REMAND**

Inspite of The Michigan Supreme Court's order on remand to decide the date of last proper billing, the Trial Court failed to do so. It simply disallowed Law

Firm's billings dated October 10, 11 and 12, 1993 for post termination ministerial tasks of returning Bakshi's files for being in violation of then applicable ethics regulations, thus leaving Law Firm without any billing proper or otherwise post October 3, 1993. Law Firm filed its complaint more than 6 years later on October 8, 1999, and thus is time barred.

The Court of Appeals did not find it necessary to decide if the Law Firm's billed items in October 1993 for said ministerial tasks were proper since they did not extend the period of the attorney-client relationship. **(Exhibit: Court of Appeals Opinion of April 1, 2008. 110a, Footnote 11)**

If the Supreme Court decides that the determination of the date of last proper billing is required, at its option it may remand the case again to the Court of Appeals.

#### XIV

#### LAW FIRM CAN NOT TAKE ADVANTAGE OF ITS UNETHICAL BEHAVIOR OF BILLING BAKSHI FOR RETURNING HIS FILES IN OCTOBER 1993 IN VIOLATION OF THEN APPLICABLE RULES OF ETHICS CI - 845 AND CI - 926

In October 1993 Law Firm knew that then applicable ethics regulations CI-845 and CI-926 prohibited billing Bakshi for the housekeeping services of returning his file after the termination of the attorney-client relationship without his consent. Such consent was not sought by the Law Firm or given by Bakshi. Subsequent ethics opinion R-19 allows to bill for such housekeeping services (but does not extend the period of the terminated attorney-client relationship).

Since complaint was filed on October 8, 1999, to avoid dismissal of the complaint on the basis of 6 year statute of limitation Law Firm was left with no

choice but to rely on its unethical billings of October 10, 11 and 12, 1993 for the tasks of returning Bakshi's files (Law Firm has no other billings post October 8, 1993). The Trial Court disallowed these 3 charges as they were in violation of then applicable ethics regulations.

As a consequence to maintain its complaint being dismissed on the basis of 6 year statute of limitations Law firm has repeatedly and improperly relied on the retroactive application of R-19 (August 2000) to the events and circumstances of October 1993. Obviously such retroactive application is without any merit and Law Firm cannot use it to take the advantage of its unethical billings to maintain its instant Law Suit or otherwise. In any event, it is fundamental legal principal that unethical actions or contracts are enforceable.

*Evans & Luptak, PLC v Lizza, 251 Mich App 187 650 NW2nd 364 (2002)*

The Court of Appeals did not find it necessary to adjudicate this issue since it did not extend the period of already terminated attorney-client relationship and therefore did not extend the accrual date.

**Exhibit:** Court of Appeals Opinion of April 1, 2008. **110a, Footnote**

**11**

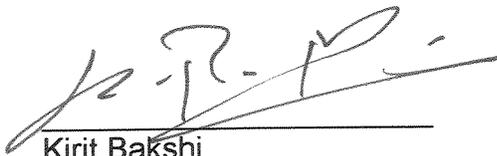
### **RELIEF REQUESTED**

For the above reasons, Bakshi asks this Court to affirm the decision of the Court of Appeals and remand the case for entry of summary judgment in favor of defendant-appellee, Kirit Bakshi with costs, attorney fees from the date of filing of

the complaint on October 8, 1999 and any other relief this Court deems appropriate.

Alternatively for the reasons stated herein Bakshi asks this Court to remand the case to the Court of Appeals to adjudicate issues properly raised by Bakshi before the Court of Appeals but were not adjudicated for the reasons stated herein.

Respectfully submitted.



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Dated: April 30, 2009